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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JOSEPH W. DARLAK,

Petitioner,

vs.

COLUMBUS-AMERICA DISCOVERY GROUP and THOMAS G. THOMPSON,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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QUESTIONS PRESENTED

1. Does the filing of and/or final judgment in a salvage action involving a shipwreck and treasure located outside of the territorial United States have an in rem, res judicata effect and bar a non-party's in personam action against the salvor relating to the salvaged property?

2. Does a potential claimant to a shipwreck and its treasure have a choice under Supplemental Rule C(1)(b) to file an in personam action against the salvor instead of intervening in an existing in-rem action which has not been finally adjudicated or which has not yet been tried?

3. Does an in rem salvage action commenced by a tortfeasor bar a related in personam action or subsequent in-rem claim against the tortfeasor for tortious misconduct carried out in secret if the published in rem notice failed to disclose the alleged misconduct?

4. Is it an unconstitutional denial of Darlak's right to a jury trial to dismiss his action for alleged failure to request intervention in the in rem Salvage Action when Darlak had moved to intervene and to consolidate his action but conditioned it upon obtaining the jury trial which he had timely demanded.

5. Did the courts below err in staying and denying all discovery, including Rule 56(f) discovery, and then granting a summary judgment motion dismissing the action (for raising no material issue of fact)?

6. Was it a denial of due process for CADG/Thompson to successfully oppose Darlak's motion to intervene and consolidate on the asserted grounds that Darlak's action was different from the Salvage Action and should be tried separately, and then for the court to dismiss Darlak's action for alleged failure to intervene?

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In The

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No. _____

JOSEPH W. DARLAK,

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vs.

COLUMBUS-AMERICA DISCOVERY GROUP, INC. and THOMAS G. THOMPSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Joseph W. Darlak hereby petitions for the issuance of a writ of certiorari to review the decision and judgment of the Court of Appeals for the Fourth Circuit in Joseph W. Darlak v. Columbus-America Discovery Group, Inc., No. 94-1874, issued on July 7, 1995.

Petitioner was the plaintiff below. There were three defendants originally, including respondents Columbus-America Dis-

covery Group and Thomas G. Thompson. The third defendant, Trustees of Columbia University (the "Trustees"), was dismissed by stipulation and order in the District Court.

OPINIONS BELOW

The 7/7/95 decision of the Court of Appeals for the Fourth Circuit (Pet. App. A, pp. 1a-9a, *infra*) is reported at 59 F.3d 20; rehearing and suggestion for rehearing in banc denied by 8/4/95 order (Pet. App. C, pp. 24a-25a, *infra*). The 6/14/95 decision of the same Court of Appeals in the related in rem action ("Admiralty Action" or "Salvage Action") which was held to be a bar to petitioner's action is reported at 56 F.3d 556. The decision of the District Court (Pet. App. B, pp. 10a-23a, *infra*) is not reported. An earlier, 8/26/92 decision of the Court of Appeals in the related Admiralty Action is reported at 974 F.2d 450.

JURISDICTION

The decision of the Court of Appeals was issued on July 7, 1995. On October 16, 1995, Chief Justice Rehnquist granted a timely motion to extend the time within which to file a petition for a writ of certiorari to and including December 2, 1995 (Pet. App. D, pp. 26a, *infra*). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The constitutional provisions, statutes and rules involved in the case are as follows:

U.S. Constitution, Amend. V. Due Process Clause

- "* * *nor be deprived of life, liberty, or property, without due process of law; * * *

U.S. Constitution, Amend. VII. Jury Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,

and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Rules C(1) and C(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims:

Rule C. Actions in Rem: Special Provisions [extract]

(1) When available. an action in rem may be brought:.

(a) To enforce any maritime lien; * * *

(b) * * * Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

(4) Notice.

No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. * * *

See Pet. App. E, pp. 27a-28a, *infra*, for the full text of Rules C(1) and C(4).

18 U.S.C. § 793,

§ 793, Gathering, transmitting, or losing defense information

See Pet. App. F, pp. 29a-32a, *infra*, for the full text of 18 U.S.C. § 793.

STATEMENT

$1 Billion CENTRAL AMERICA Treasure-4th Circuit Holds that Darlak's In Personam Claims for the Res and Damages Are Barred by Filing of In Rem Salvage Action

The Darlak Action, if tried, would have determined whether the most celebrated treasure find in history, the sunken S.S. CENTRAL AMERICA with $1 billion or more in treasure, took place as determined in the related Admiralty Action in which the petitioner was not a party, or whether the vessel was found by Darlak 2 years earlier and his data improperly obtained and used by CADG and Thompson.

Procedural Background of the Two Related Actions

CADG commenced several in-rem actions in the Eastern District of Virginia claiming to have found the sunken treasure ship at a different location each time. CADG placed an advertisement in the local newspaper as required by Rule C(4) of the Supplemental Rules, advising that any interested persons had to file their answer to the alleged in-rem pleading by a certain date. Darlak never saw the advertisement. Numerous insurance companies filed their answers.

Date for a non-jury trial was set and about one week before the trial began Darlak learned that Grimm (with whom Darlak had been associated in looking for and finding the CENTRAL AMERICA) was going to attend a court session in Norfolk concerning CADG's find of the ship, Darlak showed up with counsel several days before and learned that the date was for trial, to commence April 3, 1990. The District Court permitted Grimm, John and the Trustees to intervene and would have permitted Darlak to do so if he had so desired, but conditioned upon obtaining no discovery. Upon advice of counsel, Darlak did not intervene because they had no discovery and were not prepared for any trial. Darlak only found out on the day that Judge Kellam reopened the bar date for intervention, that the Trustees had copied and transmitted the results of Darlak's research and search data to Thompson.

Darlak did not become a party, did not testify, and did not remain for the trial. The non-jury trial was decided in favor of CADG and all other parties took an appeal.

Within several weeks after Judge Kellam's decision, Darlak filed his in personam action (without any admiralty claims) in the Southern District of New York against CADG, Thompson and the Trustees seeking damages from all and recovery of the treasure from CADG and Thompson (to the extent he were to obtain any of the treasure from CADG).

Darlak volunteered to give 1 day of deposition at the outset, but Darlak's counsel had no opportunity (other than by subsequent declarations) to clarify Darlak's testimony.

During August, 1992, the Fourth Circuit reversed and remanded the Admiralty Action to allow discovery.

Darlak stipulated with CADG and Thompson to transfer his action to the Eastern District of Virginia with the expectation of having consolidated or coordinated proceedings.

After transfer, Darlak moved to intervene but conditioned upon obtaining the jury trial which Darlak had timely demanded in his action. All parties opposed this motion and Judge Kellam denied it and stayed the Darlak Action (including all discovery) saying that the two actions were wholly different. CADG and Thompson argued that Darlak's action should be tried only after the parties in the Admiralty Action had completed their additional discovery and retrial.

On the first day of retrial, the Trustees announced their voluntary withdrawal from the Admiralty Action, announcing in effect that Ryan had no performed the research (as Darlak had been maintaining). Darlak was not present, was not a witness and was not asked to be a witness at the retrial. Grimm and John took the position during the two trials that William Ryan ("Ryan"), head of the

Trustee's Lamont-Doherty Geological Observatory, had done the research based upon which the search coordinates and area were determined

Judge Kellam denied various discovery motions by Darlak during the period after transfer and through the start of the retrial, so that Darlak was not able to obtain any discovery from CADG or Thompson.

After the trial was over and Judge Kellam ruled in favor of CADG (90%) and the insurance companies (10%), CADG moved for summary judgment in the Darlak Action. At oral argument, Judge Kellam stated that all of Darlak's claims were well-pleaded. In his written decision dated June 10, 1994, he granted summary judgment on the claimed basis that there was no evidence that Darlak's research had been communicated to Ryan and the Trustees. Darlak appealed.

Meanwhile, Grimm, John and Santa Fe appealed from the decision in the Admiralty Action, and it was affirmed on June 14, 1995, and certiorari denied, during October, 1995.

Later, the Fourth Circuit affirmed the decision dismissing the Darlak Action but on a wholly different basis. It held that Darlak was precluded under by res judicata because he failed two time to intervene in the Admiralty Action.

Darlak's petition for rehearing and for rehearing in banc was denied by the Fourth Circuit on August 4, 1995.

Historical Importance of the Darlak Action

This case is important historically and as guidance for the fast-growing industry of searching for sunken treasure. See *Columbus-America Discovery Group, Inc. v. Atlantic Mutual Insurance Company*, 113 S. Ct. 1625 (1993) (granting leave to file 13 amicus briefs, and denying certiorari).

Darlak's Complaint v. CADG, Thompson & Trustees

Darlak sued Thompson, CADG and the Trustees alleging copyright infringement and diversity claims including breach of confidential relationship, breach of trust and inducing breach of trust, breach of contract and inducing breach of contract, and various other commonlaw claims. Darlak sought recovery of CADG's and Thompson's share of the gold and artifacts, and monetary damages. Darlak's action was filed in 1990, 5 years before the judgment became final (10/95) in the Salvage Action.

Combat, Navigation, Titanic-Search Background

Darlak was an air force pilot in the Vietnam war with more combat missions than any other pilot in his type of aircraft. He had courses in navigation, escape and evasion. Jack Grimm ("Grimm") asked Darlak to review data to be used to search for the TITANIC, and Darlak determined precisely where the TITANIC could be found, confirmed when oceanographer Robert Ballard found the TITANIC. Grimm and Harry John ("John") had chartered a ship during 1983 to look for the TITANIC based on Darlak's coordinates, but due to a snagged cable failed to find when cruising right over the wreck site. But for the snag, Darlak would have been credited with finding the TITANIC. Several years after ballard found it, the results of Darlak's search was used by British naval authorities to posthumously clear the captain of the CALIFORNIAN, who had been convicted of cowardice by refusing to aid the TITANIC. Darlak's theory was that light refraction over the ice field caused positions to shift and made the TITANIC seem closer and in a different direction.

Research to Determine CENTRAL AMERICA Location

Because of Darlak's TITANIC report (and before the TITANIC was found and while John was negotiating with Thompson), Grimm asked Darlak if he would develop coordinates and a search area for the CENTRAL AMERICA to be used by Grimm and John in their planned search for it. Darlak did this, as an independent contractor. He worked for 6 months developing in-

formation, including the Maury Logs (of major ocean-going vessels from that period) which were kept in the National Archives in Washington, D.C. (and required a special research permit) which revealed the location and speed of the gulf currents at different times of the year; contemporaneous newspaper articles . Darlak became familiar with various other coordinates chosen by others unsuccessfully to locate the CENTRAL AMERICA, and recreated the events as he envisioned they unfolded, and what the ship's captain would do in an emergency, especially an experienced and capable captain and crew who had taken the same trips more than 40 times before. Darlak put all this together and accurately determined where the CENTRAL AMERICA could be found (in effect a "bulls eye" in the North Atlantic).

Darlak communicated with and traveled to numerous libraries throughout the country and reviewed hundreds (if not thousands) of newspapers, articles, books, almanacs, navigational charts and maps, manifests, ship logs, accounts, and related resources; his areas of research not only included substantial discussion of the CENTRAL AMERICA, including personal accounts of its sinking, but also concerned navigational techniques and equipment available in the 19th century, the location of currents in the Atlantic Ocean in the 19th century at different times of the year, weather patterns, wind velocities, Atlantic hurricanes, shipping routes and lanes, the Outer Continental Shelf, drift patterns, and extensive information concerning Captain Herndon and other personnel onboard the ship. He obtained tactical and general navigational charts and jet navigational charts for various portions of the Atlantic Ocean from the U.S. Air Force. Darlak reviewed hundreds of manifests, books, magazines, accounts, and almanacs at the Library of Congress. He obtained extensive information on Captain Herndon and the ship from the U.S. Navy and the Annapolis Academy Maritime Museum. He contacted and received information from maritime museums throughout the country; he analyzed the Maury Logs and contacted the Defense Mapping Agency concerning Blake Ridge and the Outer Continental Shelf; and set up a

daily schedule of the happenings on the CENTRAL AMERICA, and drew an efficient course line as opposed to the proposed and historical course assumptions that had been made (which brought the assumed path of the ship close to shore as it proceeded toward Cape Hatteras, and had misdirected many failed attempts by other salvors). Since this was the 43rd or 44th subsequent voyage of the ship, Darlak assumed the officer or navigator had done a direct course line from the turn point at Florida at which they were able to see the palm trees at Cape Florida and made their turn to the northeast and made a point of turn as close to the Hatteras light as possible without endangering the ship, bringing it too close to shore, which brought the point out into the 77 degrees longitude area which, in anyone's experience prior to Darlak's, had never been understood to be a worthwhile search area.

Darlak took the daily occurrences and gave weight to the ship's officers as to the sinking of the ship, calculating 17 knot maximum, but slowing down, and made calculations, and using his experience as an aircraft commander to understand the best possibility of survival. Darlak determined that this was to continue heading into the waves, which were churned up basically by a head-on and a counterclockwise rotating system moving north and west. Darlak constructed a hurricane model, made numerous other determinations of fact and calculations, and then made his determination of approximate location. His lengthy summary of his extensive work was in response to a single question at his deposition, and is set forth at pp. 163-173 of his deposition transcript.

Grimm, John and Santa Fe Communications ("Santa Fe") believed in Darlak's search efforts sufficiently to pay $300,000 to the Trustees to lease R/V ROBERT CONRAD and use its sidescan sonar equipment and software to try to find the CENTRAL AMERICA.

Transmittal of Data to Grimm, Ryan (Trustees)

After determining where he believed the CENTRAL AMERICA should be found, Darlak communicated this informa-

tion to Grimm, and Santa Fe entered into a contract with the Trustees for use of the research vessel.

Grimm or John communicated Darlak's search area to Ryan, who prepared a contract in which the search area (intentionally not accurate because of its value to others seeking the treasure, and yet to be adjusted by Darlak for the offset of the continental shelf) was included together with a condition that Ryan/Trustees do no work until the $300,000 was paid, occurring several days before the voyage began, and after the contract was drafted. Ryan did no research to determine the search location. He inserted Darlak's data into the contract.

Final Selection of Darlak's Search Plan Over Thompson's

On the day that the ROBERT CONRAD was scheduled to depart, four days after the contract was signed, John told the assembled group that he had chosen Darlak's search plan, and that Darlak would go on the ROBERT CONRAD as project director, which Darlak did, without John and Grimm.

One of the rejected plans was from Thompson. Another was from Standefer, whose attempts to make a claim in the CENTRAL AMERICA litigation were rejected. See *Standefer v. Thompson*, 939 F.2d 161, 162-163 (4th Cir. 1991), in which an express written agreed with Thomas Thompson dated October 7, 1983 (a joint venture with Thompson to find the CENTRAL AMERICA) never became enforceable

Grimm/John/Santa Fe Contract with Trustees

The proposed contract had a departure date of 2/26/84. The contract was signed by John/Santa Fe on 2/22/84 and provided that Trustees would do no work under the contract until they were paid $300,000. The contract did not provide for any research efforts by Trustees/Ryan, and only provided for Trustees/Ryan to operate the ROBERT CONRAD and install and operate the Sea Marc equipment.

No Research by Ryan/Trustees

Neither Ryan nor any other person on behalf of the Trustees performed any research for Grimm, John or Santa Fe.

Ryan Took Map Onboard the R/V ROBERT CONRAD

Ryan told Darlak that he and Lamont-Doherty are employed by persons seeking sunken treasure ships and do not convey information from one search group to another.

Darlak told Ryan, sometime after the contract was prepared (with the preliminary Darlak data) but before departing that the unadjusted Darlak data had to be adjusted manually by them by reference to (i.e., moved in accordance with the length of) the classified documents Ryan took on board the ROBERT CONRAD showing the location of the continental shelf. Darlak said he needed Defense Mapping Agency (military-sensitive) maps to do this and Ryan said that there was no need for Darlak to obtain such maps because Ryan already had them.

Onboard the ROBERT CONRAD

On the day of departure from Norfolk, approximately 2/26/84, Darlak and Ryan went to the control room of the ROBERT CONRAD and Darlak and Ryan entered the adjusted search coordinates into the ship's computer under Darlak's supervision.

Darlak's Ownership of Research and Search Data

Darlak was also the owner of the intellectual property consisting of the search area he created and the place where he believed the CENTRAL AMERICA could be found. He permitted Grimm, John and Santa Fe to use his intellectual property but he did not sell it or assign it to them. He believed he had an interest in any recovery but did not know what that interest would be, specifically.

U. S. Classified Defense Information Involved; Confidentiality of Research and Sonar Search Data

The ROBERT CONRAD was going to be mapping the ocean bottom near the eastern coast of the United States, which created

an immediate problem to Darlak of the requirement by 18 U.S.C. § 793 for prior review of the sonar readings by the U.S. Defense Mapping Agency to purge any military-sensitive data. Darlak, through his security clearances as a captain and pilot, and his discussions with Ryan at the start of the research voyage, was assured by Ryan that the search results would not be released to unauthorized persons, would first be cleared with Defense Mapping Agency, and in any event the specific targets would not be released to anyone and any use of the information by others would be only after the targets were eliminated from copies to be sent to others, a process called data sterilization. See 11/28/95 *New York Times* "Navy Is Releasing Treasure of Secret Data on World's Oceans" showing the confidentiality of the Darlak Data which Thompson obtained unlawfully (Pet. App. G, pp. 33a-36a, *infra*).

Finding the CENTRAL AMERICA - Target # 4

Darlak and Ryan reviewed the sonar printouts and agreed that target # 4 (as labelled by them at the time) was probably the CENTRAL AMERICA. Since it was nearly "dead center" in Darlak's search area, there was no need to verify the target any more The printouts rang like a bell with multiple reflective surfaces (metallic) in a low-profile wooden wreck.

Financial Inability of Grimm/John/Santa Fe to Salvage

Although John was the heir to a large fortune, he had run through the fortune by this time. Darlak had no financial ability to capitalize on the value of his intellectual property.

Thompson's Background; Aware of Darlak's Search

At the time of obtaining Darlak's data from the Trustees, Thompson was employed as a scientist by Battelle Memorial Institute, working on a confidential defense project for Hewlett-Packard involving target imaging.

Thompson's Theft and Misuse of Darlak Data

Thompson, as a Battelle employee, communicated repeatedly with Ryan (starting in March, 1983) and finally by letter dated

2/12/86 requesting a copy of the sonar sidescan search data (*i.e.*, the Darlak Data). Thompson claimed that he needed the data for his target-enhancement defense work. After 2 years, Ryan got approval from his superior to sell a copy of the Darlak Data to Thompson for about $250 (reproduction costs). Ryan was asked to mail the data to Thompson's home, which he did. Thompson's request was fraudulent, because he did not need or use the data in his work for Battelle, and instead transferred the data (contrary to the terms - not to be published or transferred - upon which the data was sent) to CADG and used it for purposes other than as intended.

Shortly thereafter, Thompson/CADG had one of his joint-venturers, Sea Marc expert Williamson, go to Ryan and request use of the same sonar cable, falsely claiming that Ryan could not accompany Williamson's use of the cable, because the use was highly classified naval business. Ryan/Trustees, acting pursuant to this fraudulent request, lent the sonar cable to Williamson, who then transferred it to CADG/Thompson for use in correlating the Darlak Data to other maps and data, and making optimum use of it.

Thompson/CADG Violate Defense Information Law

The activities of Thompson/CADG in obtaining the Darlak Data and SeaMarc III.5 sonar sidescan cable under these false pretenses were serious violations of the nation's laws, 18 U.S.C. § 793, protecting defense information. The defense data obtained should have been, but was not, run by the federal Defense Mapping Agency to purge it of all classified material, and the printouts themselves were of a degree of refinement which the DMA was prohibited from releasing for commercial use.

Thompson's Search & Plan-100% Failure; Uses Darlak Data after 2 Years of Futile Searching

The plan CADG followed for two years, searching the areas showing maximum probability under Thompson's assumptions, produced no CENTRAL AMERICA.

Only when CADG was running out of time and money did it turn in desperation to the area of Darlak's Data, in the "zero probability" area of Thompson/CADG's plan, an area which they went out of their way to search with sonar at the outset (and spent no great time in any other zero probability areas), before heading for the search area in their own plan. When they returned to Darlak's area two years later, they turned away from numerous unsearched areas of substantial probability on their own plan.

Thompson/CADG Finds CENTRAL AMERICA in Zero Probability Area; Drives Up to Ship Using Darlak Data

Thompson/CADG was able to drive right up to the CENTRAL AMERICA, obviously because they used Darlak's Data as a roadmap to the CENTRAL AMERICA, once they had proved to themselves that their own research was worthless.

CADG Files Salvage Claims for Wrong Locations

Prior to finding the CENTRAL AMERICA, Thompson/CADG rushed into court and obtained injunctions for different parts of their planned search area, but these search areas proved fruitless, and the areas were 35 to 50 miles or so away from the CENTRAL AMERICA.

CADG Spots ROBERT CONRAD in Darlak Area

Later, when these first several locations failed to produce the CENTRAL AMERICA, and after seeing the ROBERT CONRAD (i.e., the Trustees) on one occasion voyaging toward the CADG search area (thereby threatening to go further, into the Darlak Area and Target #4), Thompson/CADG changed their search area from their own plan to the Darlak Area and drove right up to Target #4 effortlessly.

CADG Files Salvage Claim for Correct Area; Fails to Publish Notice of Their Taking/Use of Darlak Data

CADG/Thompson rush into court to obtain an injunction for part of the Darlak Area, in which the CENTRAL AMERICA was

located (Darlak target # 4) and specifically enjoin Ryan/Trustees from interfering with CADG's salvage efforts.

Res Located 160 Miles from Territorial U.S.; Jurisdiction by Consent of Appearing Parties

The CENTRAL AMERICA and treasure were found nearly 8,000 feet below the ocean's surface about 160 miles east of the eastern United States coast, which is outside of the territorial United States, still there when CADG started its final Salvage Action. Some parties contested the jurisdiction of the District Court, but withdrew their claims, and no other parties raised the issue of jurisdiction, which prompted the Court to hold that its finding of jurisdiction was "the law of the case" and binding on the parties. See 8/14/90 decision, *Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked, etc.*, 742 F. Supp. 1327, 1332-3.

Grimm, John and Trustees Have Actual Notice in 2/90

Trustees had actual notice of the first Salvage Action (at an erroneous location) during July, 1987, when they were temporarily restrained and then preliminarily enjoined by the Court. See 8/14/90 decision, *Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked, etc.*, 742 F. Supp. 1327, 1330.

Grimm and John had actual notice of the Salvage Action no later than February, 1990, less than two months before the start of trial. Fourth Circuit's opinion dated 8/26/92, at n. 10, 974 F.2d, 469. They did not tell Darlak about the Salvage Action for most of that period (until a week or two before the trial date), and then misled him about the forthcoming proceedings, and never told him that the Trustees/Ryan had communicated Darlak's Data to Thompson/CADG.

Intervention Reopened; No Discovery; Immediate Trial; Grimm, John and Trustees Become Intervenors

John, Grimm and Trustees moved to intervene in the in-rem action on March 29 and April 2, 1990, and represented that they were ready for trial, to commence on April 3, 1990. Their motion

was granted over CADG's objections, but on the condition that they would have no discovery and trial would start the next day.

Darlak Not Notified about Thompson/CADG Wrongdoing until Several Days before 1st Trial

Darlak learned several days before the start of trial that Ryan and the Trustees had turned over the Darlak Data to Thompson and CADG. Thus, until the start of trial, Darlak had no basis for believing he had any claim.

Darlak Has No Option to Intervene ; during 2nd Day of Trial Enters into Agreement with Grimm/John/Santa Fe

Darlak decided he could not intervene without discovery because he was not prepared for trial and, on the 2nd day of trial, Darlak induced Grimm/John/Santa Fe to enter into an agreement with Darlak extending the statute of limitations for any suit which Darlak might commence against them.

Grimm/John/Santa Fe Lose 1st Trial; Notice of Appeal

Grimm/John/Santa Fe and the Trustees (and the approximately 40 insurance carriers) lost the trial, and appealed.

Darlak Sues Thompson/CADG/Trustees; Jury Demand

At this time, Darlak retained (the undersigned) counsel who brought a diversity in personam action and copyright infringement action for Darlak against CADG, Thompson and the Trustees to recover the CENTRAL AMERICA gold and artifacts, and actual damages and punitive damages, for various commonlaw claims.

1-Day Deposition of Darlak; No Cross-Examination

Darlak volunteered to have defendants take his deposition, which they started to do, for one day only, and then went no further. Darlak's counsel never had any opportunity to cross examine Darlak, leaving some ambiguities.

Judgment Reversed - Intervenors' Lack of Discovery

Meanwhile, after Darlak's deposition, the Salvage Action was reversed and remanded for discovery and a new trial.

Action Transferred for Consolidation or Coordination

After the remand and reversal, Darlak agreed to transfer his action to Norfolk for anticipated consolidation or coordination with the Salvage Action. Darlak moved to compel production of requested documents, and this motion was denied, because of the need of the parties in the Salvage Action to prepare for retrial.

Darlak Action Stayed Pending Appeal in Salvage Action

After Darlak transferred his case to the "rocket docket" of the Norfolk District Court, his motion to consolidate conditioned upon obtaining a jury trial (which he had demanded upon commencement in 1990) was denied, and his action was stayed, including all discovery, until after retrial. After the trial, and rendering of judgment, Darlak tried to obtain discovery, and this was denied; and in opposition to defendant's summary judgment motion, Darlak made another motion for discovery (Rule 56-f, limited) and this was denied, and summary judgment was granted against Darlak.

Motion to Intervene/Consolidate, with Jury Demand

Darlak moved to intervene and have his action consolidated, but conditioned upon having a jury trial. Thompson/CADG opposed the motion stating the actions were entirely different and that Darlak's Action should be tried separately, after retrial, to avoid diverting the parties from their efforts in preparing for retrial.

Motion Denied Based upon Thompson/CADG Arguments: Wholly Different Action Requiring Separate Trial

Darlak's motion to consolidate was denied. Darlak's demand for a jury trial was a basis for the denial, Judge Kellam saying that a separate trial was necessary to avoid undue complexity in the retrial (because a jury would have difficulty in distinguishing between the two types of claims).

Stay and Denial of All Discovery Until Retrial Occurs

After denial of consolidation, the Court refused Darlak's motion for discovery to prepare for his own (subsequently envisioned) trial. Discovery was to be allowed after retrial.

Trustees Withdraw from Salvage Action on 1st Trial Day

On the first day of retrial, the Trustees withdrew their claim. Darlak had maintained (via declarations) that Ryan and the Trustees had no claim whatsoever and that the data conveyed to Thompson and CADG belonged to Darlak. The Trustees merely installed and operated the ROBERT CONRAD and its equipment.

Summary Judgment Granted in Darlak Action

After retrial, Darlak tried without success to obtain regular discovery. Thompson/CADG made a motion for summary judgment, and Darlak cross-moved for limited discovery under Rule 56(f). Darlak's cross motion was denied; the motion for summary judgment was granted, the Court stating there was no issue of fact whether Darlak had given his research information to Ryan.

Salvage Action Judgment Was Not Final When Darlak Commenced His Action

It should be noted that Darlak filed his action (in September, 1990) more than 5 years before the judgment in the Salvage Action became final, after all appeals (10/95).

Judgment Affirmed on Other Grounds: Barred by In Rem Salvage Action and Darlak's 2 Failures to Intervene

Upon appeal to the Fourth Circuit, the judgment against Darlak was upheld, but on different grounds than those found by the District Court. The Fourth Circuit held that Darlak was barred by the Salvage Action, and Darlak's failure to intervene.

Petition for Rehearing and Rehearing in Banc Are Denied

A petition for rehearing and rehearing in banc made to the 4th Circuit was denied August 4, 1995 (Pet. App. C, 24a-25a, *infra*).

Petition for Writ of Certiorari Denied in Salvage Action

Petitions to the Supreme Court by (i) the insurance companies and (ii) by Grimm, John and Santa Fe for a writ of certiorari to review the Fourth Circuit's decision affirming and remanding the District Court's decision and judgment after the 2nd trial were

denied on (i) October 16, 1995 and (ii) November 27, 1995. 1995 U.S. LEXIS 7114, 7881.

U.S. History's Most Celebrated Treasure Case Has Given Credit to the Wrong Oceanographer

The wrong oceanographer has been given credit for finding the largest treasure ever found, and a legitimate claimant has been denied all regular discovery, any limited Rule 56(f) discovery, the right to a jury trial or any trial on the issues whatsoever. A person who fraudulently acquired Darlak's "treasure map" in violation of federal defense laws has been able to use an in rem action to cut off commonlaw claims which arose prior to the finding of the CENTRAL AMERICA. As to industry-wide and historical interest in the case, see *Columbus-America Discovery Group, Inc. v. Atlantic Mutual Insurance Company*, 113 S. Ct. 1625 (1993) (granting leave to file 13 amicus briefs, and denying certiorari).

Darlak's Name Never Mentioned in Either Trial

Darlak's name apparently did not come up during either trial, showing that his interests were not represented, and that everyone participating at the trials had conflicts of interest with him. Trustees withdrew their claim at the start of day 1 of the 2nd trial, after years of vigorous litigation, including a Fourth Circuit victory.

REASONS FOR GRANTING THE WRIT

I.

4TH CIRCUIT'S DECISION, THAT AN IN REM ACTION HAS RES JUDICATA EFFECT ON THE WORLD PRIOR TO FINAL JUDGMENT, IS ERRONEOUS, WILL CREATE HAVOC IN ALL IN REM LITIGATION AND A RUSH TO FILE FIRST, CAUSE WRONG LITIGATION RESULTS, AND CREATE UNCERTAINTY, INCREASED LITIGATION AND APPEALS WITHOUT JUSTIFICATION

The Fourth Circuit Is split with the Second Circuit (and probably all other Circuits) as to when res judicata becomes operative, and does not follow Supreme Court rulings.

In rem actions are binding on the world, assuming jurisdiction over the property and that proper notice has been given. But when preclusion starts is no longer clear.

The Fourth Circuit (directly contrary to the holding of the Court below) held that Darlak was precluded by the in rem action, filed 5 years before the judgment in the in rem action became final.

If the filing and pendency of an in rem action is a bar to the maintenance of any related action, an in rem action could be used for years to prevent legitimate actions for wrongdoing from being filed, and the in rem action could be dropped after the statutes of limitations had expired.

The Fourth Circuit's decision does not say how the rule is to be applied if the parties to the in rem action dismiss the action (does this reactivate any lost statute of limitations) or consent to entry of judgment. Is such a judgment final after all appeals and binding on the world? Also, the Fourth Circuit's rule is not clear as to the effect of an in rem final judgment if the action is collusive. The barring of all claims against a wrongdoer by his mere filing of an in rem action followed by a locally-published notice is too much for constitutional due process to permit.

Also, to be consistent with the Fourth Circuit's decision, the filing of an in rem action should also be a bar to the continued maintenance of a related action filed prior to the filing of the in rem action.

Undoubtedly, because of these consequences of the Fourth Circuit's decision, existing law does not support the Fourth Circuit's view. In *Central Hudson Gas & Electric Corp. v. Empresa Naviera Santa S.A.*, 56 F.3d 359, 366 (2nd Cir. 1995), decided 5/17/95, the Second Circuit held that "this in personam action is barred by the in rem judgment, if at all, only by the doctrine of res judicata ... or claim preclusion, [which] holds that **following entry of a valid final judgment, 'the parties to the suit and**

their privies are thereafter bound...'" [Emphasis added.] The Fourth Circuit's decision, if the law of the land, is a total revision of the black-letter law concerning res judicata and claim preclusion.

The Supreme Court has held that preclusion takes effect after a final judgment on the merits. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The doctrine is long established. Also, see *Cromwell v. County of Sac*, 94 U.S. 351, 352 (1876) (as to issue preclusion).

Zeldman v. Celebrezze, 252 F. Supp. 167, 172 (E.D.N.Y. 1965) held "such in rem adjudication must be given binding effect, however, only when it is a final judgment...", cited *Snell v. Secretary of Health, Education & Welfare*, 275 F. Supp. 645, 649 (E.D. LA, New Orleans Div. 1957).

Supplemental Rule C(1) permits an in rem action and/or an in personam action to be filed by the same person (*e.g.*, CADG). Thus, if Darlak's claim gives him standing to intervene in the Salvage (in rem) Action, Darlak could have initiated such action for some relief, and could have done so either in an in rem or an in personam action, under Rule C(1), or could have brought his claim as a counterclaim in the in rem action. In *Central Hudson, supra*, at. p. 365, the Second Circuit held that an in personam action for the deficiency against a judgment debtor in an in rem action was permissible under Rule C(1)(b) of the Supplemental Rules, and that the same rule permitted a plaintiff to choose between in rem and in personam remedies. The limitation, not applicable to Darlak, is that he cannot sue in personam if the substantive law imposes no personal liability. *Central Hudson, supra*, at. p. 366.

Does the election by one party to use in rem mean that Rule C(1) no longer provides an election or even the right to commence either type of action (rem or in rem) to any other person? The rule does not come to this conclusion, although the Fourth Circuit decision necessarily would arrive at that conclusion, in conflict with *Central Hudson, supra.*

An in rem action is not binding on the world until the judgment becomes final, and until such time persons have the opportunity to intervene or file in personam actions in furtherance of their in rem and in personam claims. The choice, in Supplemental Rule C(1)(a), of a salvor (lienor) commencing an in rem action (instead of an in personam action) should not preclude other salvors from electing to sue in personal prior to a final judgment in the in rem action.

The period between the filing of an in rem action and any final judgment after all appeals should permit "opting in" and "opting out" similar to class actions (which is what an in rem action purports to be).

After the in rem judgment becomes final, those who did not "opt out" by choosing in personam (or even alternative in rem) remedies would be bound by the in rem judgment. Those (such as Darlak) who were to be given separate trials would be given such trials without having their actions dismissed under res judicata.

If these obvious res judicata rules were followed by the Fourth Circuit, the Court would have been unable to reach the result it did. Darlak's Action would not have been dismissed under the principles of preclusive effect of an in rem "action" not yet reaching final judgment after all appeals.

If the Fourth Circuit is correct, the various suppliers of goods and services to CADG/Thompson for use in the search and salvage efforts have been deprived of their right to sue. It seems clear that the Fourth Circuit did not go that far, only to preclude Darlak's causes of action which arose (a) prior to discovery of the CENTRAL AMERICA or (b) prior to the salvage efforts.

II.

4TH CIRCUIT'S DECISION DESTROYS THE IN-REM/IN-PERSONAM ELECTION IN SUPPLEMENTAL RULE C(1)(b), UNDERMINES THIS COURT'S DECISION IN *SABINE*; FAILURE TO REVERSE THIS BAD PRECEDENT WILL LEAD TO SAME ADVERSE CONSEQUENCES

Darlak is a co-salvor by reason of Thompson's request for his data, and CADG/Thompson's use of it in locating the CENTRAL AMERICA. *The Sabine*, 101 U.S. 384-385 (1879).

Under Supplemental Rule C(1)(b), a salvor (i.e., lienor) has the right to commence an in rem or in personam action. *Sabine*, *supra*, made it clear that an action may be brought by co-salvors after judgment in the in rem action to recover from the proceeds of the res. 101 U.S. 386.

Darlak's action, whether treated as an in personam action for damages and/or part of the res (or proceeds thereof) which wind up in the hands of CADG and Thompson, or as an in personam or admiralty claim only for part of the res or proceeds thereof, should not have been dismissed under the doctrine of res judicata.

III.

THE 4TH CIRCUIT'S DECISION, THAT AN IN REM ACTION IS BINDING ON NON-PARTIES AS TO PROPERTY LOCATED OUTSIDE OF U.S. TERRITORIAL WATERS, CONFLICTS WITH THE 5TH CIRCUIT'S ATOCHA DECISION AND THIS COURT'S APPROVING CITATION THEREOF, AND IS CONTRARY TO A VAST BODY OF U.S. AND INTERNATIONAL LAW WHICH REQUIRES THAT THE PROPERTY PHYSICALLY BE LOCATED WITHIN THE COURT'S JURISDICTION; AND LEADS TO AN ABSURD CONCLUSION THAT THE 4TH CIRCUIT HAS JURISDICTION TO BIND THE WORLD AS TO SHIPWRECK TREASURE FOUND IN INDIAN OCEAN

CENTRAL AMERICA and treasure were found scattered around a point 160 miles (more than 200 nautical miles) off the

U.S. coast, and not in U.S. territorial waters. The Court has no jurisdiction over the res at commencement of Salvage Action and the published notices were of no consequence to bind the world.

Any jurisdiction over the res is either by consent among the parties to the Salvage Action or (possibly) over the gold and artifacts as they are physically brought into the jurisdiction years after the action has been filed. At all relevant times, a large dollar amount of gold and artifacts remain outside of the court's jurisdiction. Darlak, not a party to the Salvage Action, cannot be bound to any final judgment as to any part of the res not physically located in the court's jurisdiction (either when the notice was published or at a later date).

The Fourth Circuit is Split with the Fifth Circuit as to the res judicata effect on non-parties as to property not located in the court's jurisdiction.

Assuming for the sake of argument that Darlak's claim is only one which could be asserted in a true in rem action, the Fourth Circuit erred in dismissing Darlak's action on the basis of in-rem action preclusion (res judicata) because the CADG salvage (in rem) action was not a true in rem action. The property (including the sunken ship and the gold) at the time of commencement of the action were located about 160 miles off of the South Carolina coast and not within the territorial limits of the United States. Recovery activities continue to this day.

In *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 441, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989), this Court referred to

> "international conventions [which] permit a territorial sea of up to 12 miles [and on]... December 28, 1988, the President announced that the United States would henceforth recognize a territorial sea of 12 nautical miles. See Presidential Proclamation No. 5928, 3 CFR 547 (1988)."

In *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 711 (1982), this Court stated that, in an earlier decision, "we ... established Florida's boundaries along lines which placed the Atocha in international waters."

In *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978), the court held, in conflict with the Fourth Circuit's instant decision, that there was no jurisdiction of the Court over the bullion, artifacts and other property not located within the court's jurisdiction. The ATOCHA was found outside of territorial waters and therefore, according to the court, outside of the court's jurisdiction. The property within the court's jurisdiction had the consent of the parties to the court's jurisdiction, but the judgment in the "in rem" salvage action was not to be binding upon non-parties. The court stated:

> In affirming the district court, we do not approve that portion of its order which may be construed as a holding that plaintiffs have exclusive title to, and the right to immediate and sole possession of, the vessel and cargo as to other claimants, if any there be, who are not parties or privies to this litigation. [569 F.2d 335]

This Court, in *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670 (1982), referred to the Fifth Circuit's opinion in *Treasure Salvors, Inc.* with apparent approval. See 458 U.S. 676-677, 704.

In the CADG action, the District Court observed that there was a problem concerning jurisdiction but that this was solved by lack of any objection, that all of the parties appearing in the in-rem action had consented to jurisdiction by not contesting it. See *Columbus-America Discovery Group, Inc. v. Unidentified, Wrecked, etc.*, 742 F. Supp. 1327, 1332-3. What this means is that the CADG action was not a true in rem action, and only an in personam action which had no res judicata effect on Darlak, a non-party to such action.

IV.

THE 4TH CIRCUIT'S DECISION, THAT A PROPOSED INTERVENOR IN AN IN REM SALVAGE ACTION DEMANDING A TIMELY NOTICED JURY TRIAL, BUT DENIED INTERVENTION, IS PRECLUDED BY RES JUDICATA FROM MAINTAINING HIS IN PERSONAM ACTION, CONFLICTS WITH A PRIOR 4TH CIRCUIT DECISION, AND WILL LEAD TO MANY OF THE SAME ADVERSE CONSEQUENCES IF NOT REVERSED

Darlak did move to intervene and consolidate, making a demand for a jury trial (timely demanded at commencement of his action). CADG/Thompson and all other parties in both actions objected to the intervention. CADG/Thompson urged that Darlak's Action was different and should be tried separately. The Court could have accepted the intervention and given Darlak his demanded jury trial (before, during or after the non-jury trial in the Salvage Action), but did not.

Darlak's Action was improperly dismissed because he did in fact try to intervene over CADG's objections. A proposed intervenor in an in rem action who is denied intervention is not bound by the judgment in such action. The Fourth Circuit (as distinguished from the District Court) held that Darlak's failure to intervene in the in rem action prevented him from pursuing his claims. However, Darlak had moved to intervene (which the Fourth Circuit recognized), but Darlak had said that if he was going to be denied his jury trial and forced to try his claims non-jury, then he did not want the consolidation.

This denial of Darlak's right to a jury trial caused Darlak's motion to intervene to be denied, and the Fourth Circuit was wrong in holding that he had not tried to intervene in the in-rem action.

The law is clear. A proposed intervenor in an in rem action whose motion to intervene is rejected by the court is not bound by the decision in the action. *Jenkins v. Hartford Accident & Indem.*

Co., 733 F.2d 1090 (4th Cir. 1984), a decision ignored by the Fourth Circuit when affirming the dismissal of Darlak's action.

V.

4TH CIRCUIT'S DECISION, RESULTING IN A DENIAL OF ALL DISCOVERY, IN-REM JURY TRIAL, INTERVENTION, ANY TRIAL WHATSOEVER, DUE PROCESS, AND THE RIGHT TO A JURY TRIAL, WILL LEAD TO THE SAME DENIALS TO MANY OTHER LITIGANTS AND THE SAME CONSEQUENCES IF NOT REVERSED

Darlak was denied all requested discovery. Darlak was denied Rule 56(f), F.R.Civ.P. limited discovery. Darlak's action was repeatedly stayed. He was denied intervention and a jury trial in the Salvage Action, and any trial whatsoever in either his Darlak Action or the Salvage Action. Darlak was given no notice of the basis for his claim against Thompson or CADG until 1-2 days before start of the first trial.

Darlak's 1-day incomplete deposition was used by the Court to make findings of fact without Darlak's counsel having had any opportunity to cross-examine (and clarify) Darlak's deposition testimony, and the court rejected Darlak's declarations used to clarify the testimony. The District Court used evidence from the sealed record in the Salvage Action as grounds for its judgment dismissing the Darlak Action even though Darlak and his counsel were denied access to and are unaware of the contents of such sealed record.

He was denied all discovery, a jury trial, intervention, and any trial whatsoever. This is an unconstitutional denial of due process and a denial of the constitutional right to a jury trial.

VI.

4TH CIRCUIT'S DECISION, THAT COMMONLAW AND COPYRIGHT INFRINGEMENT CLAIMS ARISING PRIOR TO FINDING OR SALVAGE OF VESSEL ARE EXTINGUISHED BY RES JUDICATA UPON THE CHANCE FILING OR PENDENCY OF SUBSEQUENT RELATED IN-REM SALVAGE ACTION, IS ERRONEOUS AND WILL HAVE ADVERSE CONSEQUENCES UNLESS REVERSED

Darlak's claims against Thompson/CADG arose when Darlak's Data was transmitted to Thompson and when Thompson transferred and then used the information (from 1986 to 1988). Darlak could have brought action at any time thereafter, upon learning of the fraud, and prior to the filing of the Salvage Action. The filing of the in rem Salvage Action should not have the effect, at filing, of precluding Darlak's claims (whether filed in a separate action or not).

Supplemental Rule C(1) gives an option for a lienor to file an in rem or in personam suit. Darlak could have filed an in personam suit against the owners of the res (or part thereof) of the proceeds thereof. Darlak filed his in personam action against Thompson/CADG after they became owners of the res (by reason of the District Court's first judgment).

His action should not have been dismissed, whether considered to be an in personam action, an action to recover part of the res, or an in rem action separate and apart from the Salvage Action. In rem law needs some explication for the guidance of the courts and the salvage industry. Such explication will reduce the overall amount of litigation and provide needed certainty to critical decisions of how and when to commence or not commence salvage-related litigation.

CADG and Thompson, together with Williamson, conspired to obtain Darlak's Data from Ryan/Trustees and succeeded in their goal, all without Darlak's awareness.If Darlak had been aware of

what happened, he could have gone into court, in an in personam action, and obtained an injunction and actual (and punitive) damages from CADG/Thompson to prevent them from making use of the information, from transferring it, and to disclose to whom the information had already been given. The fact that CADG/Thompson used the information to locate the CENTRAL AMERICA should not cause a merger of the commonlaw claims (and action for copyright infringement) into an in rem claim requiring intervention as the only way to obtain relief.

In rem law needs to be clarified as to in personam claims, counterclaims, offsets, defenses. The Fourth Circuit apparently puts all into an in rem pot and extinguishes them by deciding that res judicata results from an in rem filing.

VII.

4TH CIRCUIT'S DECISION CONDONES RAPACIOUS AND UNLAWFUL MISCONDUCT IN THE SUNKEN TREASURE SALVAGE INDUSTRY AND IN PERSONAM LIABILITY FOR WRONGDOING TO BE EXTINGUISHED BY IN-REM FICTION OF LOCAL NOTICE PUBLICATION

Until technology enables a single pass over all ocean areas, there will be a need for research by Darlak and others to determine where search efforts should be made, but the value of these efforts is jeopardized by the Fourth Circuit's decision, which enables persons who wrongfully obtain and use the research to avoid paying for it by filing an in-rem action (with local notice requirements) to deprive the owner of the intellectual property of the fruits of his work.

Darlak's intellectual property was the key for finding the ship after 127 years and without his work the ship and its treasure might still be where he found them. The District Court dismissed the importance of this creative effort and emphasized how creative it had been for CADG/Thompson (years after the U.S. landed

on and retrieved material from the moon) to figure out how to take treasure off the ocean bottom.

Darlak went into court to seek enforcement of his rights, and was denied the opportunity to intervene because he insisted on his right to a jury trial; he was denied all discovery, any trial whatsoever, and even access to the sealed information upon which the District Court based its dismissal in part.

The Fourth Circuit holds that the notice published locally suffices to terminate all claims for wrongdoing arising before salvage of the vessel, a decision clearly erroneous. The Fourth Circuit's decision is a total disaster to the creators of intellectual property in this area of commerce and history, and should be reviewed by the grant of this petition.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted and the judgment of the Court of Appeals should be reversed and remanded to the District Court.

Respectfully submitted,

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November 1995

APPENDIX

Appendix A-7/7/95 Decision of 4th Circuit Affirming Judgment of District Court

JOSEPH W. DARLAK, Plaintiff-Appellant, v. COLUMBUS-AMERICA DISCOVERY GROUP, INCORPORATED; THOMAS G. THOMPSON, Defendants-Appellees, and TRUSTEES OF COLUMBIA UNIVERSITY, Defendant.

No. 94-1874

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

59 F.3d 20; 1995 U.S. App. LEXIS 17248

March 6, 1995, Argued

July 7, 1995, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of Virginia, at Norfolk. Richard B. Kellam, Senior District Judge. (CA-91-1303-N).

DISPOSITION: AFFIRMED

COUNSEL: ARGUED: David Alan Battaglia, GIBSON, DUNN & CRUTCHER, Los Angeles, California, for Appellant.

Robert Ward Trafford, PORTER, WRIGHT, MORRIS & ARTHUR, Columbus, Ohio, for Appellees.

Appendix A-7/7/95 Decision of 4th Circuit Affirming Judgment of District Court

ON BRIEF: Richard P. Levy, GIBSON, DUNN & CRUTCHER, Los Angeles, California; Carl E. Person, LAW OFFICES OF CARL E. PERSON, New York, New York, for Appellant.

William J. Kelly, Jr., James A. King, PORTER, WRIGHT, MORRIS & ARTHUR, Columbus, Ohio; Richard T. Robol, Jane E. Rindsberg, COLUMBUS-AMERICA DISCOVERY GROUP, Columbus, Ohio; David N. Ventker, HUFF, POOLE & MAHONEY, P.C., Virginia Beach, Virginia, for Appellees.

JUDGES: Before RUSSELL, WIDENER, and HALL, Circuit Judges. Judge Hall wrote the opinion, in which Judge Russell and Judge Widener joined.

OPINIONBY: HALL

OPINION: [*21] OPINION

HALL, Circuit Judge:

Joseph W. Darlak appeals the district court's grant of summary judgment to Columbus-America Discovery Group, Inc., and its president, Thomas G. Thompson. We affirm.

59 F.3d 20, *21; 1995 U.S. App. LEXIS 17248, **1

I.

On February 26, 1984, a crew of oceanographers from [**2] Columbia University set out from Norfolk, Virginia, aboard the research vessel ROBERT D. CONRAD to conduct a sonar survey of an area of the ocean floor thought to be the final resting place of the S.S. CENTRAL AMERICA, a treasure-laden pas-

senger ship that had sunk in a hurricane in 1857. Darlak, though not an oceanographer, was also aboard the CONRAD. Darlak had spent the previous six months researching the CENTRAL AMERICA's location for Jack F. Grimm, who, along with Harry G. John, had commissioned the survey. Grimm designated Darlak as his representative on the expedition.

During the survey, the sonar revealed a target very near where the CENTRAL AMERICA was eventually found in 1988 by Columbus-America. n1 Upon locating the CENTRAL AMERICA, Columbus-America commenced an in rem action in the district court to establish its rights regarding the shipwreck. On April 2, 1990, the day before trial of the matter began, Grimm and John, maintaining that they deserved a share of the treasure because Columbus-America had allegedly relied on the CONRAD data to find the CENTRAL AMERICA, were granted leave to intervene. n2

----------Footnotes----------

n1 The history of the CENTRAL AMERICA, and of the efforts of Grimm, John, and Columbus-America to find it, is detailed in our prior opinions addressing the primary admiralty proceedings. See Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., 974 F.2d 450 (4th Cir. 1992), cert. denied, 123 L. Ed. 2d 183, 113 S. Ct. 1625 (1993) (CADG I); Columbus-America Discovery Group v. Atlantic Mut. Ins. Co., F.3d (4th Cir. June 14, 1995) (CADG II).

[**3]

Appendix A-7/7/95 Decision of 4th Circuit Affirming Judgment of District Court

n2 At the conclusion of the trial, the district court found that Columbus-America did not rely on the CONRAD data. In CADG I, we vacated that judgment and remanded the case so that Grimm and John could conduct additional discovery. The supplemental evidence did not convince the district court; it reaffirmed its earlier finding, and, in CADG II, we affirmed the court's judgment.

----------End Footnotes----------

When counsel for the underwriters and for Grimm and John made their opening statements the next morning, Darlak was in the courtroom with his attorney, Joe Cheavens, the chief of the maritime litigation section at the Houston law firm of Baker & Botts. n3 [*22] Darlak left town that evening, but returned three days later. On that date, April 6, 1990, he entered into a written agreement with Grimm and John. The agreement set out Darlak's contention that he had researched and developed the search coordinates that were used during the CONRAD expedition; it acknowledged that Grimm and John had intervened in the in rem proceedings, and provided that

Darlak is prepared to intervene in the above proceedings. Attached [**4] hereto and incorporated herein are copies of the papers that Darlak is prepared to file. The parties agree that in consideration of Darlak not seeking to intervene, Darlak's rights will not be prejudiced with respect to any proceedings that he may hereafter institute to assert his claim to participate

59 F.3d 20, *22; 1995 U.S. App. LEXIS 17248, **4

in the find or salvage of the SS CENTRAL AMERICA. . . . Darlak agrees to cooperate with the efforts of Grimm/John to establish their rights vis-a-vis

Columbia, Columbus-America Discovery Group, Inc. and the wreck of the SS CENTRAL AMERICA by agreeing to testify if requested to do so without the necessity of being served with subpoena, by consulting with Grimm/John and his counsel from time to time upon reasonable notice, and by providing such records as Darlak may have or that are pertinent to the proceedings.

Shortly after the district court entered judgment against Grimm and John at the first trial, see note 2, supra, Darlak filed the instant action in the Southern District of New York against Columbia University, n4 Columbus-America, and Thompson. After our decision in CADG I, Darlak's case was transferred to the Eastern District of Virginia. Upon transfer, Darlak, [**5] in apparent breach of his agreement with Grimm and John, at last moved to intervene in the in rem proceeding. n5After limited discovery, Columbus-America and Thompson moved for summary judgment; that motion was granted on June 13, 1994. Darlak appeals.

----------Footnotes----------

n3 Darlak had recently retained Baker & Botts to protect his interests in the matter, and, in the days or weeks preceding the trial, another lawyer in the firm had gone to Norfolk and discovered the nature of the proceeding about to commence.

n4 Darlak's claims against Columbia were dismissed with prejudice on March 21, 1994.

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n5 Darlak later withdrew that motion and substituted one seeking to both intervene in the in rem proceeding and consolidate with it the instant in personam action. The district court seemed inclined to grant Darlak the right to simply intervene, but noted that consolidating the in personam action -- for which Darlak had demanded a jury trial -- would necessitate rehearing much of the testimony and resubmitting many of the exhibits that had been introduced in the first trial respecting findings that had not been disturbed on appeal. Because Darlak was unwilling to intervene without consolidation, the court denied the motion on March 26, 1993. Darlak did not appeal that ruling.

----------End Footnotes----------

[**6]

II.

There is a good case to be made that Darlak may not maintain a claim separate from that asserted by Grimm and John because he has no proprietary interest in the coordinates that he allegedly furnished to the CONRAD expedition, either because he was Grimm's agent, and, therefore, his claim is merely derivative, or because the coordinates had previously been widely published and were thus in the public domain. Darlak, as might be expected, contends that genuine issues of material fact regarding the questions of agency and public domain remain in dispute, thereby precluding summary judgment for the appellees.

59 F.3d 20, *22; 1995 U.S. App. LEXIS 17248, **6

We will assume, without deciding, that Darlak is correct that the existence of factual disputes would

prevent summary disposition of his claim on the merits. Summary judgment on behalf of Columbus-America and Thompson is nevertheless appropriate because Darlak failed to assert a claim before the district court in the in rem proceeding.

Actions in rem, or "against the thing," are designed to adjudicate rights in specific property as against all of the world, and judgments in such cases are binding to the same extent. Black's Law Dictionary 713 (5th ed. 1979) (citing [**7] Flesch v. Circle City Excavating & Rental Corp., 137 Ind. App. 695, 210 N.E.2d 865 (Ind. Ct. App. 1965)). In rem proceedings in admiralty are no different. "The whole world, it is said, are parties in an admiralty cause; and, therefore, the whole [*23] world is bound by the decision." Thorsteinsson v. M/V DRANGUR, 891 F.2d 1547, 1553 (11th Cir. 1990), quoting THE MARY, 13 U.S. (9 Cranch) 126, 144, 3 L. Ed. 678 (1815). n6

----------Footnotes----------

n6 See also Todd Shipyards Corp. v. F/V Maigus Luck, 243 F. Supp. 8, 11 (D.C.Z. 1965):

> The familiar principle that all the parties to a suit are bound by the decree has its widest application in cases of admiralty suits and proceedings in rem. The decree, as has been remarked, can dispose only of the thing but, so far as the thing is concerned, all the world is bound by the decree. That is to say, a decree in a proceeding in rem as to the title, or possession, or sale, or forfeiture of the thing, binds all the world. No man is allowed to come in and say that the decree does not bind him and that

he will have the matter retried: this is because all the world is party to a suit in rem.

quoting 2 Benedict on Admiralty @ 231 (6th ed. 1965).

Of course, due process demands adequate notice to persons who will be bound by any judgment -- in this case, "the whole world." Rule C(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims provides that, in cases like the one before us where the property has not been released on bond, notice is sufficient if "the plaintiff . . . causes public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed. . . ." The Advisory Committee note on the Rule states that "if . . . the vessel is not released [on bond], general notice is required in order that all persons, including unknown claimants, may appear and be heard, and in order that the judgment in rem shall be binding on all the world." The record in the in rem proceeding reflects that Columbus-America complied with Rule C(4)'s notice requirement. Moreover, Darlak had actual notice of the proceeding prior to trial.

----------End Footnotes----------

[**8] 59 F.3d 20, *23; 1995 U.S. App. LEXIS 17248, **8

The crux of Darlak's claim for relief is that he is entitled to a portion of the salvaged res. If Columbus-America and Thompson had indeed availed themselves of information proprietary to Darlak to find the CENTRAL AMERICA, Darlak would have undoubted-

ly deserved a salvage award. However, the time and place to present that claim was in the in rem proceeding, where all salvage awards are determined; the liability phase of that proceeding has now concluded, and it is res judicata as to all the world, including Darlak. As Darlak has no claim against Columbus-America and Thompson outside the context of their performance as salvors, he may not maintain an in personam action against them.

III.

Darlak twice deliberately opted to forgo the opportunity to intervene in the in rem proceeding. Under the circumstances, we have no difficulty concluding that Darlak is not entitled to a bite of a different apple merely because he would not taste the first one. He cannot convert any claim that he may have had against the CENTRAL AMERICA into a claim against Columbus-America and Thompson personally. n7

----------Footnotes----------

n7 Our disposition of this appeal renders it unnecessary to address Darlak's contention that the district court improperly denied him sufficient discovery to effectively oppose the appellees' motions for summary judgment.

----------End Footnotes----------
[**9]

AFFIRMED

Appendix B - 6/10/94 Opinion and Order of District Court Granting Summary Judgment and Dismissing Action

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

JOSEPH W. DARLAK, Plaintiff,

COLUMBUS-AMERICA DISCOVERY GROUP, INC., THOMAS P. THOMPSON and TRUSTEES of COLUMBIA UNIVERSITY, Defendants.

Civil Action No. 92-1303-N

OPINION AND ORDER

Joseph W. Darlak filed a complaint commencing this action in the United States District Court for the Southern District of New York on September 4th, 1990. Answers were filed by Columbus-America Discovery Group, Inc. (CADG), Thomas P. Thompson (Thompson) and Trustees of Columbia University (Trustees). After an agreed stay of the proceedings for a period of time, the case was by order of the Southern District of New York of December 14, 1992, transferred to this Court. The papers were received by this Court on December 28, 1992 and designated C/A 91-1303-N. Thereafter, Darlak filed motions to intervene and to consolidate this action with C/A 87-363-N & C/A 89-626-N. The motions were denied for the reasons set out in the Court's order of March 26, 1993. (Ct. File Doc. No. 24).

Appendix B - 6/10/94 Opinion and Order of District Court Granting Summary Judgment and Dismissing Action

I.

Plaintiff's complaint (Doc. No. 1) consists of 15 counts of

[end of p. 1]

some 25 pages. The complaint alleges that Darlak became acquainted with Jack F. Grimm (Grimm) and Harry G. John (John)in their search for the TITANIC. He became associated with Grimm's TITANIC expedition and in June 1983, was named as an officer of Titanic 1983, Inc. He alleges he was successful in his aid to locate the TITANIC. He alleged that shortly thereafter, John and Grimm decided to look for the CENTRAL AMERICA and requested his assistance; that he agreed to provide his professional skill as an independent contractor and consultant for John, Grimm and John's corporation, Santa Fe Communications (Santa Fe); that he performed research, made calculations and estimates to determine the location of the CENTRAL AMERICA; that said information was proprietary and his ownership of such information was not terminated; that he revealed his calculations in confidence to Grimm for use by John, Grimm and Santa Fe; that Santa Fe decided to make use of said information on or about the day that Santa Fe leased the ROBERT CONRAD rather than using the competing site information offered by others ; that Santa Fe requested Darlak to go the ROBERT CONRAD as project director and independent contractor; that he did not agree to sell or transfer his interest in the information; and that he expected to be compensated for his information if the CENTRAL AMERICA was located and any valuables were recovered. He asserts these expectations arose from an express or implied contract,

custom, usage, maritime law and conversations with John and Grimm. He continues saying that Trustees were not to own any of the information obtained and that Trustees were by written agreement to

[end of p. 2]

hold the information confidential. Darlak alleges his research and conclusions were near perfect; that he located the CENTRAL AMERICA by directing the vessel to the predetermined point, and then by performing sonar readings in the area; that the information obtained was kept by kept by Trustees for Darlak's benefit; that thereafter Trustees furnished information to Thompson in breach of confidence; that Thompson fraudulently obtained information from Ryan; that Thompson purchased plaintiff's information from Ryan; am as such held that information in trust for Darlak; that Thompson and CADG obtained and made use of such information in their search for and location of the CENTRAL AMERICA; and that he was unaware that they had obtained the information from Trustees until 1990; that the actions of Trustees amounted to a breach of confidential relationship; and that Trustees are liable to Darlak for the monetary value of the loss of the treasure to him. Darlak further alleges that the above facts state a claim for Breach of Confidential Relationship constituting Count 1; that such constitutes a Breach of Trust and Inducing Breach of Trust as Count 2; Breach of Contract and Inducing Breach of Contract as Count 3; Unjust Enrichment as Count 4; An Accounting as Count 5; Negligence as Count 6; Unfair Competition as Count 7, in that defendants prevented Darlak from using his information to salvage the treasure; such actions constituted a Lanham Act violation as Count 8;

constituted a Tortious Interference with Prospective Business Advantage as Count 9; he is entitled to Restitution as Count 10; such actions constitute a Copyright Infringement as Count 11; such

[end of p. 3]

facts constitute a Quasi-Contract, Implied Contract as Count 12; a breach of Third Party Beneficiary Contract as Count 13; constituted a violation of Federal Secrecy Laws as Count 14; and constituted a breach of Implied Covenant of Good Faith and Fair Dealings as Count 15.

On March 21, 1994, by stipulation of all parties, this action was dismissed with prejudice as to Trustees.

On February 1, 1994, defendants CADC and Thompson filed a motion to dismiss and for summary judgment, supported by briefs. Darlak responded and filed his brief. By agreement argument on the motion was heard on March 25, 1994. Counsel for Darlak was permitted to file a brief responding to questions raised during argument. Such response was filed on April 19, 1994. At that time Darlak submitted a supplemental statement of facts.

Defendants' motion and briefs state numerous grounds and reasons why a summary judgment is appropriate. Most of the grounds need not be reached and need not be dealt with here.

II.

Depositions of Darlak have been taken and filed herein. In addition on February 22nd, 1994, and on April 19th, 1994, he filed a statement under penalty

of perjury relative to his claim. He merely restated he was an independent contractor and not an employee of Grimm, John or Santa Fe; that if Grimm and related parties located the CENTRAL AMERICA he would receive fair compensation for his services; that his analysis of the area to be surveyed in the 1984 search was chosen over two others; that he

[end of p. 4]

formulated the search plan which was relied upon in conducting the side scan sonar search for the CENTRAL AMERICA in 1984 while aboard the ROBERT CONRAD; that he kept Dr. Ryan and Grimm apprised of the results of his search and analysis of the location of the CENTRAL AMERICA; that CADG and Thompson relied on his information which was the result of his analysis and that he should be permitted to conduct complete discovery before the Court on the motion for summary judgment.

In Darlak's April 19, 1994 statement he says that "the materials generated by the sonar survey were my documentation ... the acquired target results of the sonar survey could only be disseminated according to my rules and with my permission ..." (April 19, 1994 statement, Doc. No. 50)) Continuing in that statement, Darlak says "[U]tilizing the search area and coordinates I generated, as well as maps of the ocean bottom, Dr. Ryan apparently placed a proposed search area in his contract with Grimm."

The evidence presented by Darlak in his depositions and statements will be hereafter dealt with in detail. It is to be reviewed and considered in light of the other facts and circumstances in the case. Location of

the CENTRAL AMERICA, and the salvaging of its cargo was an enormous undertaking. Years of research had taken place. A detailed search plan was created after study by the best experts in the field.

III.

Searching for a particular wreck in the Atlantic in waters of

[end of p. 5]

a depth of a mile and a half or more, even with modern equipment, was risky and a game of chance. Others had previously conducted such a search and even while CADG was conducting its search, there were others seeking to locate the CENTRAL AMERICA. While locating the wreck was not the only problem, being certain the wreck located was the CENTRAL AMERICA was the important thing; and of more importance was how to salvage the cargo. Discovery and recovery of the cargo extended over some 13 years and has required the expertise of numerous persons and equipment as well as the expenditure of more than $25 million.

Too, the evidence shows that Trustees asserted a claim for a share of the salvage which they subsequently dismissed. John and Grimm also asserted a claim for a share of the salvage. Each of them contended that CADG made use of the information collected in the 1984 survey by the ROBERT CONRAD, which Grimm and John assert was their property. It is the information alleged to have been acquired by and belonging to Trustees and John and Grimm that Darlak alleges resulted from his research, knowledge and directions, and consequently belongs to him. Another question is whether CADG used any information belonging

to John and Grimm. That question is now before the Fourth Circuit.

IV.

We now turn to the statements and depositions of Darlak. Some, but not all of Darlak's allegations in his complaint are dealt with in his statements under penalty of perjury. (The statement of February 22 will be referred to as Statement 1 and the

[end of p. 6]

one of April as Statement 2.) We consider the motion for summary judgment under the often related principles applicable to such motions, and where there is a material fact in dispute, such motions should be denied. References to deposition pages relate only to Darlak's depositions, unless otherwise stated, and they will show "p" and page number.

It was Grimm who first introduced Darlak to the notion of searching for the CENTRAL AMERICA, and provided him with some material after which he began collecting data and material. (P. 171-179). This was in late September - early October 1992. Darlak testified that he was a "project consultant" to Grimm. (P. 49-50). He said he wrote letters on Grimm's behalf on Grimm Oil Company stationery and signed them "project consultant." When questioned about any contract or agreement for compensation, he related he had no contract or agreement. In paragraph 23 of his complaint, Darlak alleges he expected to be compensated for use of his information "in the event the CENTRAL AMERICA was located by him and/or Santa Fe and any gold or other valuables were recovered by the Santa Fe project." He said that the only person with

whom he ever had a discussion about compensation was Grimm and that was at a time when he had already done all of his work. (P. 162). Earlier be testified that Grimm wanted him as a project consultant and researcher on the CENTRAL AMERICA project to provide him with coordinates of the wreck of the CENTRAL AMERICA. He said that at that time there was no discussion of compensation, and that they had determined the value of the gold was somewhere between $1 and

[end of p. 7]

$3 billion; that there were no discussions of how he would be compensated and he expected a fair compensation, but they never discussed what a fair compensation would be. (P. 48-51). When asked directly, "There was no discussion that you would be compensated any way at all", he responded "there were implications we are all going to be rich when we find it. (P. 50-51) He said he had been Vice President of the Titanic 83, Inc. and served as an independent contractor there, (P. 45-47) but that he received no compensation from that venture, (P. 51) not even his out of pocket expenses. (P. 52). When asked if he ever had any conversation with anyone about his entitlement to compensation in connection with the CENTRAL AMERICA, he said just casual conversations with Grimm which he had already mentioned, and his expectations were that he thought Grimm would do the right thing. (P. 53-54). However, he testified John never said he would give him any compensation at all. (P. 53).

As a reading of his deposition will show, it was difficult to got a straight answer from Darlak, but through persistent questioning, some direct answers

were obtained. He testified that in January 1984, he suggested to Grimm a search area 10 nautical miles by 10 nautical miles centered on the point 77 minutes 10 degrees (minutes and degrees are reversed) West and 31 degrees 25 minutes North. (P. 65). This was his preliminary decision. (See chart marked as Defs'. Ex. D with Dep.). Darlak testified the chart had been made "a few months ago" in connection with this litigation. (P. 65-66). However, he said he had communicated this information to Grimm. He later testified that the coordinates put in the computer on the ship were 77 West 31 30 North. When asked if he "told Dr. Ryan that the search centered on 77 West 31 30 North and that at his request, those coordinates were put into the computer" he responded, "[A]t my request. At my approval ...." (P. 77). When he was then asked if those coordinates were not the precise coordinates Dr. Ryan recommended to Santa Fe prior to the departure of the CONRAD, he answered that they were the coordinates stated in the contract of the 20th or 22nd of February, 1984. (P. 77-78). That is, Ryan had recommended that coordinate to Grimm for the search without conferring with, or knowing, or having any knowledge from Darlak. Prior to going aboard the vessel ROBERT CONRAD for the 1984 survey, Darlak had never talked with Ryan or discussed any coordinates for the proposed search. (See P. 78-87). Darlak further testified that before he went aboard the vessel ROBERT CONRAD he had not reached a conclusion as to the location of the CENTRAL AMERICA. (P. 57). Darlak's own testimony is not consistent, and it changes. In his statement No. 2, paragraph 5, he says that the final decision for the search area was not made until Grimm, John, Ryan and he were on board the ROBERT CONRAD the day before the search expedition began; that "the

final decision was made at a meeting aboard the ship, after I convinced the other parties which area should be searched. Thus, any assertion that Dr. Ryan came up with the search area is simply not true." In that same statement, paragraph 3, he says that the target acquisition information reflected in the sonar survey was my unique property ... and I had given permission to John and Grimm to have access to

[end of p. 9]

the target information for the sole purpose of salvaging the vessel."

The mere fact Ryan, Grimm and John have given evidence challenging Darlak's statements would not in and of itself justify summary judgment. But, the issue does not end here. The course of the survey of 1984 was run in accordance with the map prepared by Dr. Ryan. This map was the one carried aboard the ROBERT CONRAD by Dr. Ryan and described in a written contract prepared in February, 1984. Darlak admits he did not see or know of this map before going aboard the ROBERT CONRAD. The coordinates which Darlak says were his were already set out in the written contract of February, 1984. Neither Dr. Ryan nor anyone else could have gotten these coordinates from Darlak, for he said he had not communicated them to anyone,not even to Grimm. (P. 96-97). Darlak suggested he directed deployment of the sonar, yet he testified Dr. Ryan did not discuss deployment of the sonar with him. (P. 91-92). Though he now says the information obtained from the survey was his, none of the survey reports or other information from the survey was given

or sent to him (P. 92) and he never told Dr. Ryan that he (Darlak) was to be the owner of any materials generated during the survey. (P. 90). Reports from several of the persons who were on board and participated in the survey were made to Grimm and John, but none were made to or by Darlak.

The evidence here from Darlak is that he never mentioned coordinates to Ryan prior to going aboard the ROBERT CONRAD for the 1984 survey. Ryan had already designated these coordinates - 77

[end of p. 10]

West 31 30 North - in a written contract in February as proper coordinates for the survey, independent of any information from or conversation with Darlak. The coordinates selected by Ryan were the coordinates used. It is probable there was no discussion with Darlak of the route of the survey until he went aboard the vessel, for the coordinates used were the coordinates from the map prepared by Ryan. It seems more than strange that Darlak, as he says, was the owner of the information obtained by the survey, yet no report from the survey was sent to him (P. 92), nor did he have a copy of any map, computer information or any other document from the survey. Contrary to his testimony, he never gave the coordinates 77 West 31 30 North to anyone prior to going aboard the ROBERT CONRAD. When asked as to when he gave the coordinates to Dr. Ryan, he said "after having given them to Jack, I took the coordinates on board the CONRAD." (P.94).

Again, contrary to his testimony that he never gave the coordinates to anyone until he went aboard the ROBERT CONRAD, he said in his Statement No. 1 at

Paragraph 16 that he kept Dr. Ryan and Grimm apprised of the results of his research and his analysis of the location of the CENTRAL AMERICA. In paragraph 11 of that same statement, he said he formulated the search plan which was relied upon in conducting the side scan sonar. However, it is clear the search plan used in the survey was the one prepared by Dr. Ryan and described in a written contract prior to the time Darlak said he first made his information known to anyone. Lastly, he asserts the information acquired by the survey was to be

[end of p. 11]

"disseminated according to my rules and with my permission" (Statement No. 2, para. 3) and otherwise was to remain confidential. This is contrary to the terms of the written contract for use of the ROBERT CONRAD for the survey, and to the terms of the contract between Santa Fe and Trustees dated February, 1984, which provided that the information was to be in the public domain after a specified time.

The claim of Darlak that the coordinates 77 West 31 30 North were suggested by him or are a result of any effort on his part, is clearly not true. This information was in the public domain long before Darlak was born. Furthermore, these coordinates had been written in the plan of the search area before Darlak became associated with the project.

Darlak's written statements submitted with his opposition to the summary judgment motion by CADG contradicts his deposition testimony. He is here seeking to do what the plaintiff undertook in *Barwick v. Celotex Corporation*, 736 F.2d 946 (4th Cir. 1984).

There, in opposition to a motion for summary judgment, the plaintiff submitted affidavits in conflict with his earlier deposition. In dealing with that issue, the Court, at page 960, said:

> "If a party has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact." *Perma Research and Development Co. v. Singer*, 410 F.2d 572, 578 (2d Cir. 1969). A genuine issue of material fact is not created when the only issue of fact is to determine
>
> [end of page 12]
>
> which of the two conflicting versions of the plaintiff's testimony is correct. *Radobenko v. Automated Equipment Co.*, 520 P.24 540, 544 (9th Cir. 1975).

See also *Rohrbough v. Wyeth Laboratories, Inc.*, 916 F.2d 970, 975 (4th Cir. 1990).

Here, Darlak raises no issue which can be called genuine. in his deposition, he was asked to state each of the bases of his claims and the support tberefor. His statements attempting to explain or add thereto are of no consequence. He is bound by his deposition testimony. See *Perma Research, supra.*

As has been so often written, summary judgment was never intended to be a substitute for trial where there are issues to try. It's object is to determine whether one party has real support for its version of the

facts. If not, summary judgment is appropriate and cannot be defeated by supposition or conclusions or contentions on the hope something will turn up at trial. There must be a dispute as to a material fact in this case.

Defendant's motion for summary judgment is therefore GRANTED and this action in dismissed.

Copy of this Order and Opinion is forwarded to counsel.

/s/ RICHARD B. KELLAM

UNITED STATES DISTRICT JUDGE

Norfolk, Virginia

June 10, 1994

[end of p. 13]

Appendix C - 8/4/95 Order by 4th Circuit Denying Petition for Rehearing and Suggestion for Rehearing in Banc

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Filed

August 4, 1995

No. 94-1874

CA-92-1303-N

JOSEPH W. DARLAK, Plaintiff-Appellant,

v.

COLUMBUS-AMERICA DISCOVERY GROUP, INCORPORATED; THOMAS G. THOMPSON, Defendants-Appellees,

and

TRUSTEES OF COLUMBIA UNIVERSITY, Defendant.

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

Appendix C - 8/4/95 Order by 4th Circuit Denying Petition for Rehearing and Suggestion for Rehearing in Banc

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague

CLERK

Appendix D-10/16/95 Letter from Supreme Court Clerk-Time to File Petition for Writ of Cert. Extended to 12/2/95

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, DC 20543-0001

William K. Suter
Clerk of the Court
October 16, 1995

Area Code 202
479-3011

Mr. Theodore B. Olson
Gibson, Dunn & Crutcher
1050 Connecticut Avenue
Washington, DC 20036-5303

Re: Joseph W. Darlak
v. Columbus-America Discovery Group, et al.
Application No. A-338

Dear Mr. Olson:

The appplication for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on October 16, 1995, extended the time to and including December 2, 1995.

This letter has been sent to those designated on the attached notification list.

Sincerely,
Wiliam K. Suter, Clerk
By /s/ Troy D. Cahill
Troy D. Cahill
Assistant Clerk

Appendix E - Rules C(1) and C(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims

Rules C(1) and C(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims

Rule C. Actions in Rem: Special Provisions

(1) When available. an action in rem may be brought:.

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto;

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

[subparapraphs (2) and (3) omitted]

(4) Notice.

No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify

Appendix E - Rules C(1) and C(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims

the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

[subparapraphs (5) and (6) omitted]

Appendix F - 18 U.S.C. § 793, Gathering, transmitting, or losing defense information

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 37. ESPIONAGE AND CENSORSHIP

18 USCS § 793 (1995)

§ 793, Gathering, transmitting, or losing defense information

(a) Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information is to be used to the injury of the United States, or to the advantage of any foreign nation, goes upon, enters, flies over, or otherwise obtains information concerning any vessel, aircraft, work of defense, navy yard, naval station, submarine base, fueling station, fort, battery, torpedo station, dockyard, canal, railroad, arsenal, camp, factory, mine, telegraph, telephone, wireless, or signal station, building, office, research laboratory or station or other place connected with the national defense owned or constructed, or in progress of construction by the United States or under the control of the United States, or of any of its officers, departments, or agencies, or within the exclusive jurisdiction of the United States, or any place in which any vessel, aircraft, arms, munitions, or other materials or instruments for use in time of war are being made, prepared, repaired, stored, or are the subject of research or development, under any contract or agreement with the United States, or any department or agency thereof, or with any person on behalf of the United States, or otherwise on behalf of the United States, or any prohibited place so designated by the President by proclamation in time of war or in case of national emergency in which anything for the use of the Army, Navy, or Air Force is being prepared or constructed or stored, information as to which prohibited place the President has determined would be prejudicial to the national defense; or

Appendix F - 18 U.S.C. § 793, Gathering, transmitting, or losing defense information

(b) Whoever, for the purpose aforesaid, and with like intent or reason to believe, copies, takes, makes, or obtains, or attempts to copy, take, make, or obtain any sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, document, writing, or note of anything connected with the national defense; or

(c) Whoever, for the purpose aforesaid, receives or obtains or agrees or attempts to receive or obtain from any person, or from any source whatever, any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note, of anything connected with the national defense, knowing or having reason to believe, at the time he receives or obtains, or agrees or attempts to receive or obtain it, that it has been or will be obtained, taken, made, or disposed of by any person contrary to the provisions of this chapter [18 USCS @@ 792 et seq.]; or

(d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted or attempts to communicate, deliver, transmit or cause to be communicated, delivered or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it on demand to the officer or employee of the United States entitled to receive it; or

(e) Whoever having unauthorized possession of, access to, or control over any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map,

Appendix F - 18 U.S.C. § 793, Gathering, transmitting, or losing defense information

model, instrument, appliance, or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation, willfully communicates, delivers, transmits or causes to be communicated, delivered, or transmitted, or attempts to communicate, deliver, transmit or cause to be communicated, delivered, or transmitted the same to any person not entitled to receive it, or willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it; or

(f) Whoever, being entrusted with or having lawful possession or control of any document, writing, code book, signal book, sketch, photograph, photographic negative, blueprint, plan, map, model, instrument, appliance, note, or information, relating to the national defense, (1) through gross negligence permits the same to be removed from its proper place of custody or delivered to anyone in violation of his trust, or to be lost, stolen, abstracted, or destroyed, or (2) having knowledge that the same has been illegally removed from its proper place of custody or delivered to anyone in violation of his trust, or lost, or stolen, abstracted, or destroyed, and fails to make prompt report of such loss, theft, abstraction, or destruction to his superior officer--

Shall be fined under this title or imprisoned not more than ten years, or both.

(g) If two or more persons conspire to violate any of the foregoing provisions of this section, and one or more of such persons do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be subject to the punishment provided for the offense which is the object of such conspiracy.

(h)(1) Any person convicted of a violation of this section shall forfeit to the United States, irrespective of any provision of State law, any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, from any foreign

Appendix F - 18 U.S.C. § 793, Gathering, transmitting, or losing defense information

government, or any faction or party or military or naval force within a foreign country, whether recognized or unrecognized by the United States, as the result of such violation.

(2) The court, in imposing sentence on a defendant for a conviction of a violation of this section, shall order that the defendant forfeit to the United States all property described in paragraph (1) of this subsection.

(3) The provisions of subsections (b), (c), and (e) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21

U.S.C. 853(b), (c), and (e)-(p)) shall apply to--

(A) property subject to forfeiture under this subsection;

(B) any seizure or disposition of such property; and

(C) any administrative or judicial proceeding in relation to such property,

if not inconsistent with this subsection.

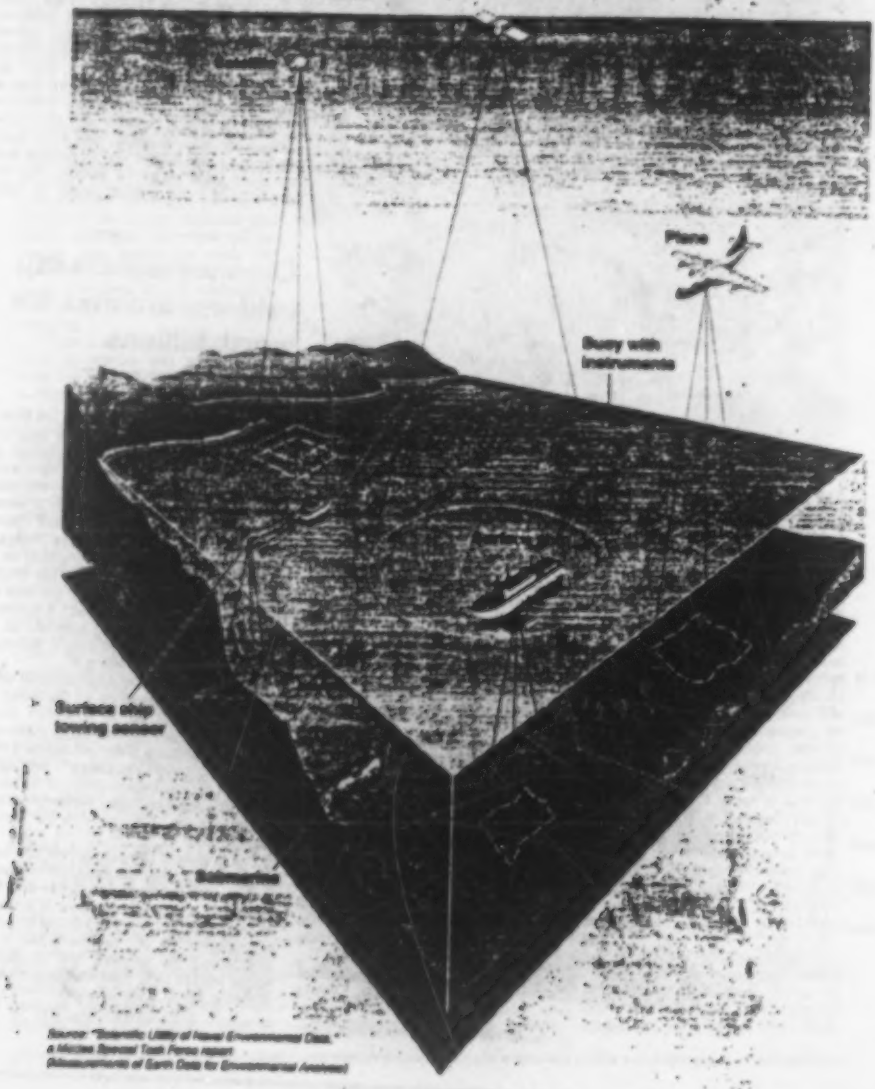
(4) Notwithstanding section 524(c) of title 28, there shall be deposited in the Crime Victims Fund in the Treasury all amounts from the forfeiture of property under this subsection remaining after the payment of expenses for forfeiture and sale authorized by law.

Appendix G - NYTimes Article 11/28/95 "Navy Is Releasing Treasure of Secret Data on World's Oceans"

Navy Is Releasing Treasure of Secret Data on World's Oceans

A Secret Trove of Global Oceanographic Data

Over the years, especially during the cold war, the Navy conducted systematic surveys of most of the world's oceans. Data from many ships were combined with information from satellites, aircraft and unattended buoys to measure things like gravitational and magnetic fields; seafloor depths and sediments; salinity, and vertical temperature differences. Now this classified information is gradually being publicly released and studied for its application to environmental research.

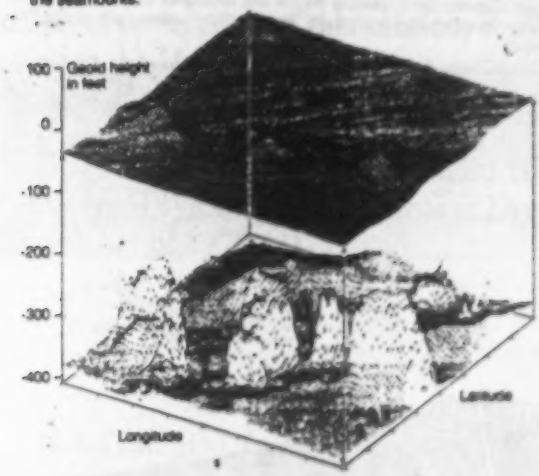


Source: "Scientific Utility of Naval Environmental Data," a Marine Board Task Force report [illegible]

Appendix G - NYTimes Article 11/28/95 "Navy Is Releasing Treasure of Secret Data on World's Oceans"

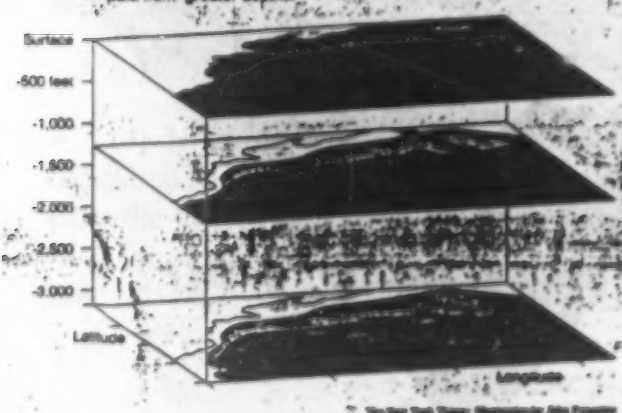
A Look at the Ocean Floor and How It Affects the Surface

Naval data provide two very different pictures of a small section of the ocean and show how subsurface features are echoed on the surface. Above are satellite readings of the sea surface heights. Below are readings of the ocean depths taken from shipboard, clearly showing the seamounts.



Long-Sought Data Profiling A Vast River in the Ocean

The difference in temperature at three levels of a section of the Gulf Stream. The data depicts an ocean current in unusual detail, from the surface to a depth of about six-tenths of a mile. Scientists can easily get surface temperature from satellites but have been frustrated in getting comprehensive data from greater depths.



The New York Times: Illustration by John Papanek

By WILLIAM J. BROAD

THE Navy is starting to release a treasure trove of physical data about the sea that was gathered in secrecy during the long decades of the cold war, exciting scientists who see it as a bonanza for understanding environmental change.

The riches include readings on ice depth, ice shape, ocean depth, sediment composition, sea-surface height, salinity, seabed magnetics, water temperature, bioluminescence and light transmissibility. Over the decades, the Navy deployed thousands of ships, airplanes, submarines and satellites to collect such data. Usually kept secret, the information was viewed as vital to the quiet war against the Soviet Union, helping submariners glide stealthily through the sea and hunt out the hidden assets of their

Oceanographers say cold war archives are worth billions.

adversaries.

Today, such archival readings are seen as unrivaled yardsticks for judging long-term processes like global climatic change and planetary warming. Indeed, the Navy keeps decades of detailed readings on the thickness of the Arctic icecap, which is considered one of the most sensitive and reliable indicators of global temperature change.

"The Navy holds much more data on the past state of the oceans than the civilian community could ever hope to get hold of," said Dr. Gordon J. MacDonald, a geophysicist at the University of California at San Diego. "The value of that data is measured in tens of billions of dollars."

The release of naval data has been championed by Vice President Al Gore and Mr. Mosher, a group set up by Mr. Gore that is headed by Dr. MacDonald and is made up of about 60 scientists from academia and industry who advise the nation's intelligence agencies on how secret data can be used to study the environment. Mosher stands for Measurements of Earth Data for Environmental Analysis.

The release of the data is part of a broader push throughout the Federal Government to turn cold war assets to good use. While the focus of the naval effort is historical, dealing with past data, a related effort also championed by the Mosher group is now redirecting the nation's spy satellites to spend part of their time snooping on nature to detect environmental shifts.

Continued on Page C12

Appendix G - NYTimes Article 11/28/95 "Navy Is Releasing Treasure of Secret Data on World's Oceans"

Continued From Page C1

The Medea group's lobbying already prompted the Navy this summer to release gravity measurements of the world's sea floors, which civilian oceanographers promptly turned into the first good map of the global seabed. Although a major milestone, that represented just a tiny fraction of the secret and sequestered data now scheduled for public release.

"It's a real event in the history of oceanography," said Dr. Walter Munk, a member of Medea who is a leading scientist at the Scripps Institution of Oceanography in San Diego.

Dr. Edward C. Whitman, technical director of the Office of the Oceanographer of the Navy, said perhaps 95 percent of the Navy's physical data would eventually be made public. Studies that weigh the risks and benefits to national security are nearly complete, he said, adding that there is little or no chance of foot dragging.

"There's a lot of pressure on the Navy to release this stuff coming from the very highest levels of the Government," Dr. Whitman said in an interview. "And that will move us to make a decision."

Some of the data are considered sensitive because they reveal information of military importance like the exact routes of warships and submarines and disclose patrol zones and patterns. In other cases, the public release of data acquired inconspicuously in the coastal waters of foreign nations might prove embarrassing. The Navy says it is considering ways to make the public release as large as possible, in some cases by declassifying only data summaries or data from certain geographic regions.

Presumably some of the data were gathered by submarines that trespassed into territorial waters of friendly and unfriendly states, though the Navy admits no such thing. These nations may be appalled by the public release of data about their submerged territories, yet in theory such information could be a potential gold mine available at no cost, courtesy of the United States Navy.

The Navy's oceanographic data holdings are so rich and varied that they are expected to advance many fields beyond environmental studies, including geology, climatology, weather forecasting, pollution studies, marine engineering, commercial fisheries management and deep oil and mineral exploration.

The riches are appraised in a 55-page report published by the Medea group in June, titled "Scientific Utility of Naval Environmental Data." The 11-member panel that wrote the report was headed by Dr. Otis B. Brown of the University of Miami.

In a foreword to the report, Dr. MacDonald said the release of the secret naval data would aid not only civilians but also the military because wide analysis would inevitably "strengthen the Navy's overall capabilities to understand and utilize the oceans in addressing its national security responsibilities."

These are some of the data proposed for release and the Medea group's assessment of their importance:

Marine gravity. Large seabed features like deep rifts and high mountain ranges exert gravitational influences on surface waters miles above, and these influences can be read with sensitive instruments. The gravity data that were recently released came from a Navy satellite that in the 1980's made gravity measurements over all the world's oceans as part of a quiet effort to increase the accuracy of long-range missiles fired from submarines. But in addition to that effort, fleets of Navy ships spent decades making even more detailed gravity measurements in certain parts of the seas. These are now up for declassification.

The Medea group's report said that their release would throw much new light on geology, including the volcanic workings of midocean ridges, the variations of crust thick-

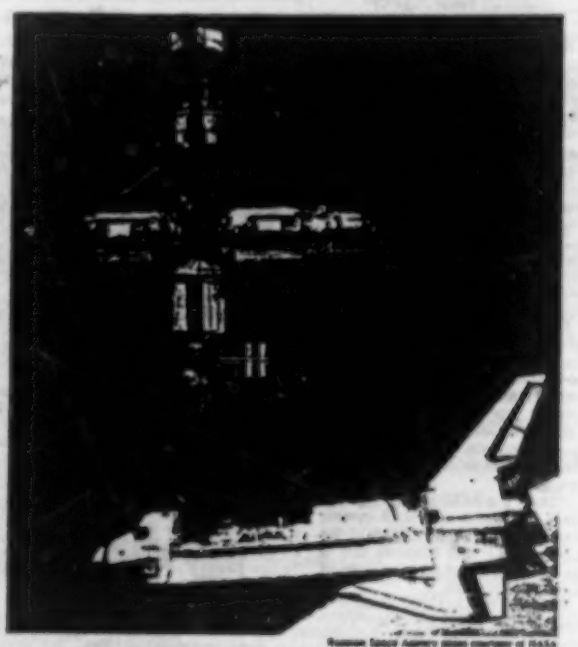
A Snapshot of Restless Arctic Ice

Dark arrows represent average annual ice drift across the Arctic Basin; arrow lengths are proportional to the speed. The solid lines labeled 1 to 6 indicate the likely number of years that the ice will survive before it leaves the ocean or melts.

Source: "Scientific Utility of Naval Environmental Data," Medea

The New York Times

Appendix G - NYTimes Article 11/28/95 "Navy Is Releasing Treasure of Secret Data on World's Oceans"



Russian Space Agency photo courtesy of NASA

Shuttle-Mir Docking: The View from Space
This photograph of the space shuttle Atlantis and the Russian space station Mir was taken from a Soyuz spacecraft near the end of first docking mission this year, on July 4.

seas, and the structure of puzzling fracture zones that run perpendicular to the ocean ridges.

¶**Geomagnetics.** For decades, the Navy made wide surveys of seabed magnetism, partly for purposes of navigation. The Medea group said that the release of these data would improve navigational safety and aid understanding of the evolution of the earth's crust, since over the ages bands of volcanically erupted seabed became magnetized in different ways as they cooled. The data, the Medea report said, would also illuminate the workings of the earth's core and inner regions that are responsible for the planet's magnetic field.

¶**Seafloor sediments.** The Navy conducted a global program to determine sea floor sediment types and thicknesses, partly to understand how sound echoed off the bottom and to improve its tracking of enemy ships and submarines. The Medea report said release of such data would aid the search for manganese nodules, titanium deposits, oil-saturated sediments and salt domes that act as petroleum traps. More generally, it would aid the understanding of how currents act to speed erosion and deposition.

¶**Ice ships and depth.** The Navy amassed huge amounts of information on the frigid Arctic because it was a main theater for the deadly serious hide-and-seek games of nuclear-armed submarines from East and West. Arctic ice was both a hazard and a haven; its jagged downward spikes threatening to pierce submarines as well as providing visual and acoustic cover. In the silent war, the Soviets tried to hide their missile-carrying subs under the ice-cap while American attack submarines tried to track them closely, ready to destroy them if the war turned hot.

The Medea group said decades of ice data promised to be a major aid in pinning down the reality of global warming, in studying fluctuations in climate, in forecasting ice conditions and in calibrating civilian satellite sensors that pass over polar regions.

¶**Marine bathymetry.** For decades Navy ships crisscrossed the sea to map the inky darkness of its lower regions by bouncing sound waves off the bottom. Such seabed maps were used for everything from navigation to understanding current flow and sound propagation. In general, they are much sharper than the civilian ones recently made from gravity readings. The Medea group said the maps would greatly aid the understanding of seabed geology and evolution and would pinpoint such seabed features as undersea volcanoes.

¶**Temperature and salinity fields.** Since 1906, the Navy has carefully gathered global data on ocean temperatures and salinities, two measures that are closely intertwined. Among the Navy's uses for such data were understanding the propagation of sound through the sea, which aided the detecting of enemy submarines at great distances. The Medea report said the release of such data would greatly aid climate studies.

¶**Ocean optics and bioluminescence.** The Navy made global measurements to determine light transmissibility for such things as knowing the potential for the visual detection of underwater objects and for such studies as laser depth readings. The Medea group said the release of such data would aid the design of satellite sensors.

Among its recommendations, the Medea report called for the creation of an "exploitation center" for the released data at the Stennis Space Center at Bay Saint Louis, Miss., which is also the headquarters of the Naval Oceanographic Office.

Dr. Landry J. Bernard, technical director of the Naval Oceanographic Office, said in an interview that 10 to 20 percent of the data had been declassified and that much more was on the way. He said historical data on ocean temperature and salinity began to be released in the past four or five years, after the cold war. "That's when we really got active" in opening up the Navy's endless archives of oceanographic data, he said.

As for the future, Dr. Bernard said: "We're taking a proactive role. It's, 'When in doubt, release.' If you can't make a good case for it being classified, then it's open, whereas before it was the other way around, to keeping it secret."

Copies of the Medea report can be requested at 703-883-5280 voice, fax 703-883-6190.